IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

THURSDAY, THE 21ST DECEMBER 2006 / 30TH AGRAHAYANA 1928

CRL.A.No. 1603 of 2006(Y)

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SC.1598/2001 of ADDL.SESSIONS COURT (ADHOC)-IV, TRIVANDRUM
CP.45/2001 of JUDL. MAGISTRATE OF FIRST CLASS COURT-II, NEDUMANGAD

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APPELLANT:

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RAJAPPAN, C.NO.744, CENTRAL PRISON,
TRIVANDRUM.

BY ADV. ADV.REENA ABRAHAM(STATE BRIEF)

RESPONDENTS:

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STATE OF KERALA REPRESENTED BY
A PUBLIC PROSECUTOR.

BY PUBLIC PROSECUTOR SRI. K.S. SIVAKUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 21-12-2006 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**V. RAMKUMAR, J.**

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**CRL. APPEAL NO. 1603 OF 2006**

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**Dated, this the 21st day of December 2006**

**JUDGMENT**

In this appeal preferred from the Central Prison, Thiruvananthapuram, the appellant who was the sole accused in S.C. No. 1598/01 on the file of the Addl. Sessions Judge, Fast Track Court (Adhoc) No. IV, Thiruvananthapuram, challenges the conviction entered and the sentence passed against him for offences punishable under Sections 8(1) and 8(2) of the Abkari Act.

2. The case of the prosecution is that on 27-1-2001 at about 1.45 p.m. the accused was found in possession of 8 ½ liters of illicit arrack in two jerry cans one of 20 liter capacity and other of 2 ½ liters capacity and was also having a glass tumbler in his hand meant for sale of the illicit arrack and the accused thereby committed offences punishable under Sections 55(a) and (h) of the abkari Act.

3. On the accused pleading not guilty to the charge framed against him by the court below for offences punishable under Sections 8(1) and 8(2) of the Abkari Act, the prosecution was permitted to adduce evidence in support of its case. The prosecution

altogether examined 7 witnesses as P.Ws 1 to 7 and got marked 7 documents as Exts. P1 to 7 and three material objects as Mos 1 to 3.

4. After the close of the prosecution evidence the accused was questioned under Section 313 (1)(b) Cr.P.C. with regard to the incriminating circumstances appearing against him in the evidence for the prosecution. He denied those circumstances and maintained his innocence.

5. The learned Sessions Judge, after trial, as per judgment dated 26-6-2006 found the appellant guilty of the offences charged against him and sentenced him to undergo rigorous imprisonment for two years and to pay a fine of Rs. 1,00,000/- and on default to pay the fine to suffer rigorous imprisonment for a further period of three months. It is the said judgment which is assailed in this appeal.

6. I heard Advocate Smt. Reena Abraham, the learned counsel who defended the appellant on State Brief and Advocate Sri. Sivakumar, the learned Public Prosecutor who defended the State.

7. The only point which arises for consideration in this appeal is as to whether the conviction entered and the sentence passed against the appellant are sustainable or not ?

**THE POINT:**

8. P.Ws 1 and 2 are the two independent witnesses to the

search and seizure. Even though both of them admitted their signatures in Ext.P1 seizure mahazar, they turned hostile to the prosecution. P.W.3 is the head constable who accompanied the detecting officer. P.W.4 is the police Constable who was in the company of the detecting officer. P.W.5 was the thondi section clerk attached to the committal magistrate's court. P.W.6 was the A.S.I. of Vithura Police Station, who detected the offence. P.W.7 is the Sub Inspector of the said Police Station who laid the charge.

9. After an anxious reappraisal of the oral and documentary evidence, I am not satisfied that the prosecution has succeeded in establishing the guilt of the accused beyond reasonable doubt.

10. It was while on patrol duty that P.W.6 A.S.I. of Vithura Police Station accompanied by P.Ws 3 and 4 chanced to stumble upon the accused with two jerry cans and a glass templer. One of the jerry cans having 20 liters capacity contained 7 liters of a solution which was suspected to be illicit arrack. The other jerry can was of 2 ½ liters of capacity and it contained 1 ½ liters of a solution which was also suspected to be illicit arrack. After seizing the jerry cans together with the contraband liquid under Ext.P1 seizure mahazar the accused was arrested and the properties as well as the seizure documents were produced before the police station where P.W.6

registered Ext.P4 F.I.R. Eventhough he produced the material objects on the same day at 7.30 p.m. before the committal Magistrate he was requested to produce the same on the next working day i.e. on 29-01-2001 during working hours. He complied with the same. Ext.P5 is the property list evidencing the production and receipt of the properties before the committal court on 29-1-2004. During the course of the investigation, P.W.7 the Sub Inspector filed a forwarding note dated 17-3-2001 requesting the forwarding of a sample from the contraband solution to the Chemical Examiner's Laboratory. But what has been marked as the forwarding note and assigned the number as Ext.P6 is really not the forwarding note but the covering letter No. 376/01 dated 3-4-2001 of the committal Magistrate to the Chemical Examiner's Laboratory, Thiruvananthapuram. The forwarding note dated 17-3-2001 which is available in the file was actually not marked as an exhibit. Eventhough the thondi Section Clerk attached to the Committal Court was examined as P.W.5, neither the prosecution nor the trial judge elicited from him the act of sampling nor the date on which the sample was taken. A perusal of Ext.P7 report of Chemical analysis shows that it refers to a letter No. 26/01 dated 3-4-2000 from the Judl. First Class magistrate -II, Nedumangad indicating the receipt of

a sealed bottle containing 180 ml. of a clear and colourless liquid alleged to be arrack. The said liquid on analysis was found to contain 31.56 percent of Ethyl Alcohol. The number assigned to Ext.P6 covering letter is No. 376/01 and it is dated 3-4-2001. But the date of the letter shown in Ext.P7 chemical examination report is 3-4-2000. No attempt was made to clarify the mistake, if any, when the thondi section clerk (property clerk) was in the witness box. Similarly, it was also not elicited through the thondi section clerk as to who drew the sample and what quantity and on what date and further whether the sample was drawn from the bulk quantity of contraband liquor produced in the case. It is the duty of the prosecution to prove that the sample which ultimately reached the hands of the chemical examiner and which had admittedly changed hands was drawn from the liquid suspected to be contraband arrack seized from the accused and that it reached the hands of the chemical examiner in a tamper proof condition. ***(Vide State of Rajasthan v. Daulat Ram - AIR 1980 SC 1314 and Valsala V. State of Kerala - 1993 (2) KLT 550 SC).***

11. When there is no acceptable link evidence to show that the sample which was analysed under EXt.P7 certificate of chemical analysis was the sample drawn from the contraband liquor seized in

this case and the said sample was dispatched in a tamper proof condition, the conviction recorded and the sentence passed by the court below overlooking the above vital aspects cannot be sustained and are accordingly dislodged.

12. The appellant is found not guilty of the offences punishable under Secs. 8(1) and 8 (2) of the Abakri Act and is acquitted thereunder. He is set at liberty. He shall be released from prison forthwith unless his continued detention is needed in connection with any other case.

In the result, this Criminal Appeal is allowed as above.

**V. RAMKUMAR,**
**(JUDGE)**

**V. RAMKUMAR, J.**

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**CRL. APPEAL NO. 1603 OF 2006**

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**Dated, this the 21st day of December 2006**

**JUDGMENT**